



COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
SUCV2012-02705-BLS2

CROSBY VALVE, LLC,
PENTAIR VALVES & CONTROLS US LP,
& FMC CORPORATION,
Plaintiffs

vs.

ONEBEACON AMERICA INSURANCE COMPANY, et al.,
Defendants

MEMORANDUM OF DECISION AND ORDER ON
(1) ONEBEACON AMERICA INSURANCE COMPANY AND
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S
JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT AND
(2) PLAINTIFFS' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT
CONCERNING RIGHT TO CONTROL DEFENSE OF UNDERLYING CASES

This action concerns the coverage obligations of various insurers in connection with asbestos-related litigation against plaintiffs Crosby Valve, LLC (Crosby LLC), Pentair Valves & Controls US LP (Pentair), and FMC Corporation (FMC). Two of the insurers, One Beacon America Insurance Company (One Beacon) and National Union Fire Insurance Company of Pittsburgh, PA (National Union) have offered to defend Pentair in that underlying litigation without a reservation of rights. By way of a joint motion for summary judgment, OneBeacon and National Union are now seeking a declaration from this Court that, as consequence of that offer, they have the right to select defense counsel and control the defense in those underlying lawsuits and have no liability to Pentair for defense costs going forward. Plaintiffs not only oppose that motion but have filed their own motion on this issue, claiming that OneBeacon and National Union are not entitled to control the defense of these lawsuits, much less settle them.

(JAT)

NOTICE SENT
11-02-18
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P.A.Z.
S.E.D.

This Court concludes that the insurers' Motion must be **Allowed** and that the plaintiffs' Motion must be **Denied**.

BACKGROUND

The summary judgment record reveals the following material facts.

A. Relevant Corporate History

The entity currently known as Crosby LLC was founded in 1874 as Crosby Steam Gage & Valve Company and was incorporated in Massachusetts in 1875. In 1957, Crosby Steam changed its name to Crosby Valve & Gage Company, which was in the business of manufacturing and distributing valves used in connection with the creation, flow, and storage of gas, liquid, and steam. These valves as well as other products manufactured by Crosby Valve & Gage contained asbestos.

Over its 144 year history, Crosby went through a number of name changes as well as numerous stock acquisitions and mergers. In April of 1981, Crosby Valve & Gage became a wholly-owned subsidiary of Geosource, Inc. In May of 1984, Moorco International, Inc. acquired Crosby Valve & Gage from Geosource. In June, 1995, FMC acquired Moorco, at which time Crosby Valve & Gage changed its name to Crosby Valve, Inc. On June 5, 1998, FMC, Moorco, and Crosby Valve, Inc. entered into an agreement and plan of merger with Tyco and its affiliates in which Tyco acquired Moorco and Crosby Valve, Inc. Subsequent to that merger, Tyco combined the operations of Crosby Valve, Inc. and another Tyco manufacturing subsidiary Anderson Greenwood LP (AG LP). In conjunction with that move, Crosby Valve, Inc. contributed its assets and business (including asbestos related liabilities and concomitant rights under its historic insurance policies) to an entity called Crosby Holding, Inc. which in turn assigned those rights and liabilities to AG LP. That contribution was governed by a Contribution

Agreement. Following further name changes and transactions, those contributed assets and liabilities were combined into an entity later known as Pentair.

B. The OneBeacon and National Union Primary Insurance Policies

For the periods between May 23, 1974 and May 23, 1976, OneBeacon issued insurance policy numbers CLCB9793-0001 and CLCB9793-0005 to Crosby Valve & Gage (the OneBeacon Policies). For the period between October 1, 1983 and October 1, 1984, National Union issued insurance policy number GLA9424045 to Geosource. National Union issued policy numbers GLA9601513, RMGLA1979978, RMGLA2496428, and GL4596766, -67, -68 to Moorco for certain periods between October 1, 1984 and May 31, 1990 (collectively with Policy Number GLA9424045, the “National Union Policies”). Crosby Valve & Gage was named as an additional insured on the National Union Policies. The OneBeacon Policies and the National Union Policies provide primary coverage.

Part I of the OneBeacon Policy Number CLCB9793-005 states, in relevant part:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

Coverage A. bodily injury or
Coverage B. property damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend suit against [the insured seeking damages on account of] such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company’s liability has been exhausted by payment of judgments or settlements.

Paragraph 4 of the Conditions Section of the OneBeacon Policies states:

The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident.

The OneBeacon Policy Number CLCB9793-001 and the National Union Policies contain language that is substantially similar.

On July 12, 2012, OneBeacon filed this action against FMC, Crosby Valve, Inc., Crosby Valve & Gage, Tyco LP, and certain insurers alleged to have issued policies to Crosby Valve & Gage. The action sought declarations regarding the parties' rights and obligations under these policies with respect to lawsuits in which claimants sought compensation for bodily injuries arising from exposure to asbestos or asbestos-containing products manufactured, sold and/or distributed by Crosby Valve & Gage and its successors (the Underlying Lawsuits). The parties were later realigned so that FMC, Crosby LLC, and Pentair are now the plaintiffs. As a plaintiff, Pentair seeks to establish that it is entitled to coverage under the policies issued by OneBeacon and National Union.

C. Offer to Defend

In a letter dated January 15, 2015, OneBeacon offered to defend Pentair in connection with certain of the Underlying Lawsuits without a reservation of rights. OneBeacon also offered to pay any indemnity arising out of those lawsuits, "subject only to the available limits of the policies." A list of the lawsuits which OneBeacon agreed to defend was attached, and included only those lawsuits in which Pentair was named as a party. The letter added that, if Pentair

believed that a particular lawsuit should have been included in the list (for example, because Pentair should have been named as a party but was not), then it was to notify OneBeacon as soon as possible. The letter stated that it intended to use a certain law firm as Pentair's National Coordinating Counsel. The offer made clear that it did not apply to the defense of Crosby LLC or FMC or to claims for which Pentair does not have any financial responsibility.

Counsel for Pentair (writing on behalf of Crosby LLC as well) responded to this letter with a series of questions. It also objected to using the firm OneBeacon had designated. OneBeacon responded by providing answers to the questions, and pointed out that its offer was to defend Pentair without a reservation of rights and did not extend to Crosby LLC. It agreed to use different counsel to address Pentair's concerns in that regard. On March 5, 2015, National Union notified Pentair that, in light of OneBeacon's offer to defend it without a reservation of rights, it too would work with OneBeacon to determine its participation in Pentair's defense. National Union has since agreed (like OneBeacon) to defend Pentair without a reservation of rights.

Since January 1, 2015, between 1,200 and 1,300 claims have been tendered to OneBeacon and National Union. OneBeacon has sent offers to defend each time plaintiffs' counsel tendered claims. Pentair has rejected every offer.

DISCUSSION

OneBeacon and National Union argue that the offer to defend Pentair in the Underlying Lawsuits without a reservation of rights means that they have a contractual right to control the defense (including negotiating and settling the claims) and that, as a result of this offer, Pentair has no right to be indemnified for its defense costs going forward. The parties agree that whether the insurers are correct in that position turns on the application of the legal principles

set forth in OneBeacon America Ins. Co. v. Celanese Corp., 92 Mass. App. Ct. 382, 387-388 (2017), rev. den., 479 Mass. 1107 (2018) (Celanese). In Celanese, the Appeals Court held that the insurer's right to control the defense of its insured is necessarily inferred from the concomitant duty to defend. Where an insurer seeks to defend under a reservation of rights, the insured may decline the offer and then seek to be reimbursed for its defense costs. But where an insurer offers to defend without a reservation of rights, then, pursuant to the policy language, it has the right to control the defense of its insured, including the authority to choose counsel and to make other decisions that would be traditionally vested in the insured as the named party in the case. The insured may justifiably refuse to have the insurer control the defense only if the insurer had a conflict of interest. Because the insured in Celanese had not demonstrated such a conflict, its refusal to allow the insurer to assume control of its defense meant that it could not be reimbursed for the costs of defending against the underlying claims.

Pentair maintains that OneBeacon and National Union have a conflict of interest. As to what would constitute a conflict sufficient to justify an insured's refusal to cede control of the defense to the insurer, that too was discussed in Celanese. As the Appeals Court explained, the circumstances giving rise to such a conflict would include: "(1) when the defense tendered is not a complete defense under circumstances in which it should have been, (2) when the attorney hired by the carrier acts unethically and, at the insurer's direction, advances the insurer's interests at the expense of the insured's, (3) when the defense would not, under the governing law, satisfy the insurer's duty to defend, and (4) when, though the defense is otherwise proper, the insurer attempts to obtain some type of concession from the insured before it will defend." Id. at 388-389 (citation omitted); See also 1 Windt, Insurance Claims & Disputes § 4:25, at 225-227 (6th ed. 2013) (Windt) (recognizing those same circumstances as creating a conflict).

A conflict of interest might also arise “if the defense provided by the counsel selected by the insurer was materially inadequate.” Id. In the instant case, plaintiffs argue that two conflicts of interest exist: (1) OneBeacon and National Union have failed to tender a complete defense, and (2) the two insurers have conditioned their coverage offers on improper concessions by Crosby. This Court concludes that no conflict as defined by Celanese exists in this case.

I. Failure to Tender a Complete Defense

With regard to the first claimed conflict, plaintiffs are not contending that either OneBeacon or National Union has agreed to provide only a partial defense in any of the Underlying Lawsuits that are the subject of the offer. Rather, the argument is that their offer targets only a small subset of the 20,000 claims of injurious exposure to asbestos arising from Crosby products. The offer does not extend to the much larger number of cases naming Crosby LLC or its former parent FMC. As a consequence, plaintiffs argue, if this Court were to allow the insurers’ motion, they would be empowered to pursue their own interest of minimizing their defense costs by quickly settling the Pentair cases, where the limits of liability can be quickly exhausted, and that could adversely impact FMC and Crosby LLC’s interests. In mass asbestos litigation involving hundreds of thousands of underlying claimants, plaintiffs contend that it is essential that they be able to follow a disciplined and coordinated defense strategy so as to ensure factual and legal consistency among the various claims, regardless of which entity is the named defendant in the underlying litigation. This is particularly true (they assert), where the claimants in the underlying litigation often mistakenly sue the wrong party.

There are several flaws in this argument, however. First and foremost, there is no basis in the case law for finding a conflict as a result of the insurer agreeing to defend, without a reservation of rights, only some cases but not all of them. That is, OneBeacon is completely

within its rights to continue to oppose coverage with regard to Crosby LLC or FMC at the same time that it concedes coverage as to Pentair. If Crosby and/or FMC are ultimately determined to be entitled to coverage, then OneBeacon will be held fully responsible. As to plaintiffs' concern that asbestos claimants are sometimes confused as to which party to sue (and that the insurers' offer therefore does not extend far enough), there is no basis for holding an insurer responsible for such a mistake by requiring it to extend coverage to misnamed parties. There is therefore nothing inherently unfairly about OneBeacon's taking the position that certain of the Underlying suits are not covered because they do not involve Pentair. In any event, the offer here specifically invited Pentair to supplement the list of cases that One Beacon and National Union agreed to defend, particularly if in Pentair's view, there had been a misnomer. To date, Pentair has not identified a single claim that was improperly excluded.

Plaintiffs' more general concern that defense counsel chosen by OneBeacon will act in a way inconsistent with the interests of other plaintiffs is also not a basis for finding a conflict of interest sufficient to supplant the insurer's right to control the defense of a particular claim. Certainly, the mere fact that there are multiple firms handling the same cases does not in and of itself warrant a finding that a conflict of interest exists. Nor is it enough that the insured and the insurer have a different view as to an insured's potential liability. Celanese, 92 Mass.App.Ct. at 391, quoting Windt, §4.20, at 205. The lawyer chosen by the insurer still has a duty of unqualified loyalty to the insured. Indeed, "to mitigate the danger that the insurer will favor its own interest to the exclusion of the insured's, good faith requires that it make the decision (whether to settled a claim within the limits of the policy or try to case) as it would if no policy limit were applicable to the claim." Celanese, 92 Mass.App. Ct. at 391, quoting Murach v. Massachusetts Bonding & Ins. Co., 339 Mass. 184, 187 (1959). Accordingly, if the lawyer

chosen by OneBeacon resolves a claim in such a way as to put its own interest over the interests of the insured, plaintiffs will have a remedy.

Finally, plaintiffs rely on the Contribution Agreement that was entered into in connection with the 1998 merger when Tyco combined the operations of Crosby Valve, Inc. and another Tyco manufacturing subsidiary AG LP, with the contributed assets and liabilities ultimately ending up as part of Pentair. Plaintiffs interpret that agreement to mean that Crosby's asbestos liabilities and the concomitant insurance assets relating to those liabilities remain with Crosby Valve, Inc. in order to avoid a forfeiture of historical coverage rights. As this Court understands it, plaintiffs assert that OneBeacon cannot therefore offer to defend Pentair on policies that were the subject of that Contribution Agreement while simultaneously treating Crosby as having no rights under those same policies. This Court disagrees. As this Court construes that agreement, its purpose was to make sure that Pentair (including its predecessor entities) could take advantage of any assigned asset, including any insurance policy, and that in connection therewith, the parties to the agreement promised to "cooperate in any reasonable arrangement." See Section 6.1(c) and (d) of Contribution Agreement. That does not in this Court's view prevent OneBeacon from declining coverage to Crosby LLC at the same time that it concedes coverage for Pentair. Indeed, whether or not Crosby LLC has rights under these same policies is not an issue that this Court need resolve at this juncture.

II. Coverage Offer Conditioned on Improper Concession

The Appeals Court in Celanese also stated that an insured may reject an offer to defend without a reservation of rights where the insurer attempts to obtain some improper concession from the insured as a condition of accepting the offer. Here, plaintiffs allege that such an improper concession has been proposed because OneBeacon together with National Union have

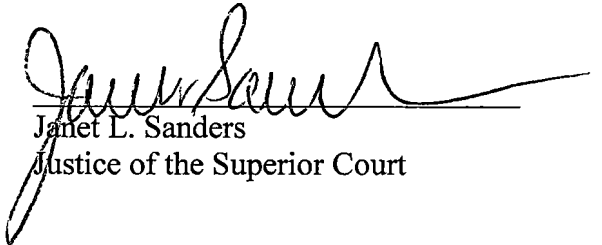
made it clear that they do not intend to limit themselves to settling the Underlying Suits to which the offer pertains based on their pro rata share of indemnity costs. That pro rata approach is the methodology the SJC has held must be followed in allocating losses in long tail claims (i.e. claims where the trigger of coverage potentially extends across numerous policy periods) where fact-based avocation among different insurers is not feasible. Boston Gas Co., v. Century Indemnity Co., 454 Mass. 337, 358 (2009). (Boston Gas). This Court agrees with the defendants that Boston Gas does not pose any limits, however, on the ability of an insurer to control the defense in a case – and then to settle it for whatever amount it deems appropriate subject to seeking contribution from other insurers. Indeed, both the National Union and the OneBeacon policies essentially give the insurer full authority to settle any claim or suit “as it deems expedient.”¹

CONCLUSION AND ORDER

For all the foregoing reasons, OneBeacon and National Union’s Motion for Partial Summary Judgment is **ALLOWED** and the Plaintiffs’ Cross Motion for Partial Summary Judgment is **DENIED**. It is hereby **ORDERED** that: (1) OneBeacon and National Union has the right to select defense counsel and control the defense of any and all underlying suits as to which they offer to defend Pentair without a reservation of rights, and (2) OneBeacon and National Union have no obligation to pay any defense costs incurred by Pentair with respect to those underlying suits as to which OneBeacon and National Union have offered to defend Pentair without a reservation of rights.

¹ Of course, as already noted above, the insurer must act at all times in good faith. Thus, if either OneBeacon or National Union were to settle any claim in violation of that duty, the plaintiffs would have a remedy.

OneBeacon's and National Union's request for attorney's fees related to the instant motions pursuant to G.L. c. 231, § 6F is **DENIED**.



Janet L. Sanders
Justice of the Superior Court

Dated: October 31, 2018